No. 94-818

(4)

FILED
MAR 15 1996

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

HERCULES INCORPORATED

and

WM. T. THOMPSON COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITIONERS' REPLY BRIEF

GREGORY W. HOMER
RHONDA D. ORIN
ANDERSON KILL OLICK & OSHINSKY
2000 Pennsylvania Ave., N.W.
Suite 7500
Washington, D.C. 20006
(202) 728-3100

WALTER S. ROWLAND
HERCULES INC.
Hercules Plaza
Wilmington, Delaware 19894
(302) 594-5000

JAMES S. TURNER
ALAN DUMOFF
SWANKIN & TURNER
1424 16th Street, N.W.
Suite 105
Washington, D.C. 20036
(202) 462-8800

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 I Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

14 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTRODUCTION	1
THE *SPEARIN* CLAIM	3
THE DEFENSE PRODUCTION ACT CLAIM	7
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

In Re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984) 6
In Re "Agent Orange" Product Liability Litigation, 818 F.2d 145 (2d Cir. 1987) 6-7
Alabama Metal Products, Inc. v. United States, 4 Cl. Ct. 530 (1984) 10
California-Pacific Utilities Co., 194 Ct. Cl. at 720 .. 9
Damanti v. a/s Inger, 314 F.2d 395 (2d Cir. 1963), *cert. denied*, 375 U.S. 834 (1963) 5
Dynalectron Corp. v. United States, 4 Cl. Ct. 424 (1984) 10
Eastern Airlines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957 (5th Cir. 1976) 8
Electro-Methods, Inc. v. United States, 3 Cl. Ct. 500 (1983), *aff'd in part*, 728 F.2d 1471 (Fed. Cir. 1984) 10
Lopez v. A.C. & S., Inc., 858 F.2d 712 (Fed. Cir. 1988), *cert. denied sub nom., Eagle-Picher Industries v. United States*, 491 U.S. 904 (1989) 9-10
Matter of Assumption by Government of Contractor Liability to Third Persons—Reconsideration, 62 Comp. Gen. 361 10
Space Age Engineering, Inc. v. United States, 4 Cl. Ct. 739 (1984) 10
Tankrederiet Gefion A/S v. Hyman-Michaels Co., 406 F.2d 1039 (6th Cir. 1969) 4-5
United States v. Spearin, 248 U.S. 132 (1918) 2

STATUTES

Defense Production Act, Section 707, 50 U.S.C. § 2157 ..... 7, 9, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-818

HERCULES INCORPORATED

and

WM. T. THOMPSON COMPANY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITIONERS' REPLY BRIEF

INTRODUCTION

From the moment petitioners were ordered to produce Agent Orange subject to the enforcement provisions of the Defense Production Act, the damages suffered by these manufacturers were inescapable. While the government would like to pretend otherwise, the following facts must be accepted as true at this stage in the litigation:

(1) pursuant to its authority under the Defense Production Act, the government compelled petitioners Wm. T. Thomspon Company ("Thompson") and Hercules Incorporated ("Hercules") to manu-

facture Agent Orange in accordance with specifications devised by the government;

(2) the government, but not petitioners, knew that Agent Orange manufactured according to the government's specifications was potentially dangerous;

(3) the government's use of Agent Orange in Vietnam led to petitioners being sued in tort by a class of individuals allegedly harmed by exposure to Agent Orange;

(4) Thompson and Hercules entered into a reasonable settlement of these tort claims on the eve of a trial where they faced enormous potential liability, and did so only after petitioners had attempted without success to have the case dismissed prior to trial on the basis of what eventually came to be known as the government contractor defense; and

(5) had Thompson and Hercules followed the course suggested by the government, rejected settlement and faced enormous potential liability at trial, the *best* that could have occurred was that liability to the Agent Orange class would have been avoided, but the companies still would have faced legal fees of a magnitude comparable to the amounts that petitioners paid out in settlement.

On this set of facts, the court of appeals held that, as a matter of law, petitioners had no remedy against the government.

Two issues arising from the court of appeals' ruling are the subject of this petition: first, whether the government can use the government contractor defense to *tort claims* to bar *breach of contract claims* against the United States that otherwise would be permissible under *United States v. Spearin*, 248 U.S. 132 (1918); and, second, whether the plain language of the Defense Production Act requires the United States to reimburse petitioners for the damages they suffered as a consequence of being compelled to manufacture Agent Orange. The government's opposition

to the petition consists largely of arguments for disposing of petitioners' contract claims on alternative grounds, grounds upon which the court of appeals expressly declined to rely. To the extent that the government defends the court of appeals' actual resolution of the first issue posed above, the government's argument actually supports granting the petition. The government's argument on the second issue is a *non sequitur* and provides no reasoned basis for opposing the petition.

In contrast, petitioners have already demonstrated the generalized importance of having these two issues decided by this Court. Indeed, the need for this Court's review in this case has now been seconded by the United States Chamber of Commerce which has filed an *amicus* brief urging that the petition be granted.

THE *SPEARIN* CLAIM

The court of appeals rested its rejection of the *Spearin* contractual warranty claim asserted by Hercules and Thompson on one ground and one ground only: because Hercules and Thompson settled with the Agent Orange class on the eve of trial instead of continuing to litigate, Hercules and Thompson "volunteered" to suffer the damages which inevitably flowed from the government's conscription of their manufacturing facilities. In their petition to this Court, Hercules and Thompson demonstrated that certiorari should be granted because this ruling by the court of appeals conflicts with established contract principles and important policy considerations, and will create unnecessary confusion and uncertainty through its application of tort law concepts and policies to the arena of government contracting.

In opposing the petition, the government itself finds little that is defensible in the holding of the court of appeals. Instead, the government seeks to rely on alternative grounds to dispose of petitioners' *Spearin* claim, grounds which the court of appeals *expressly declined* to

rely on as a basis for its decision.[1] It is wholly inappropriate for the government to urge that review be denied in this case on grounds the court of appeals rejected. The United States urged the causation theory which the court of appeals adopted below and the United States should defend that holding now.

What little the government does say in defense of the court of appeals' actual ruling on the *Spearin* claim bolsters the case for granting the petition. The government's argument highlights the split in the circuits as to whether "actual liability" to third parties must be demonstrated before recovery may be had on a breach of warranty claim, or whether "potential liability" is sufficient.

The government contends that the court of appeals' resolution of the *Spearin* claim could be upheld on the grounds that such a claim would require not merely a showing of "potential liability" to the third-party tort plaintiffs as petitioners urge, but would necessitate a demonstration of "*actual* liability" in tort to the Agent Orange plaintiffs. Op. Cert. at pp. 19-20 (emphasis in original). In making this argument, the government cites to *Tankrederiet Gefion A/S v. Hyman-Michaels Co.*, 406

---

[1] For example, the government argues that "there is no reason for this Court to question the conclusion that petitioners' implied indemnity claim is too implausible to present a genuine issue of fact for trial." Op. Cert. at 13. However, no such "conclusion" is to be found anywhere in the court of appeals' decision. Similarly misplaced is the government's attempts to argue against the grant of *certiorari* on the basis that petitioners would not be able to prove a breach of warranty because there is no "credible evidence" that Agent Orange actually injured the tort plaintiffs in the Agent Orange litigation. Op. Cert. at 14-15. In the first place, proof of actual injury to the Agent Orange plaintiffs (as opposed to proof of injury to Hercules and Thompson) is completely irrelevant to the elements of petitioners' breach of warranty claims as urged in this Court because there was a judicial finding that there was sufficient exposure to make settlement reasonable. In any event, this was *not* the basis of the court of appeals' decision, nor could it be in the posture in which the case was decided.

F.2d 1039, 1042 (6th Cir. 1969), as adopting a "general rule" requiring a showing of actual liability. What the government flatly ignores is that at least one other circuit has rejected this approach and has held that potential liability is sufficient, even where a jury subsequently makes findings which establish that no actual liability existed. *Damanti v. a/s Inger*, 314 F.2d 395 (2d Cir. 1963), *cert. denied*, 375 U.S. 834 (1963). The existence of this split in the circuits on this fundamental question of third party liability when applied in the government contracts context is a powerful reason for this court to grant the petition.[2]

Most of what remains of the government's argument in support of the court of appeals' resolution of the *Spearin* claim consists of an effort to demonstrate that the underlying settlement in the Agent Orange litigation was not reasonable. Indeed, the government goes so far as to make the conclusory pronouncement that "petitioners' settlement could not have been 'reasonable.'" Op. Cert. at 20. Such a contention flies in the face of the government's admissions that the government contractor defense is "factual" in nature and that the government actively opposed petitioners' efforts to rely on this defense in the Agent Orange litigation. Op. Cert. at p. 4, note 2.

While it is true that, without the benefits of any fact finding, the Federal Circuit impliedly held that the Agent

---

[2] The government also argues that the theory underlying petitioners' *Spearin* claims would "cede to government contractors the power to create indirect governmental liability to tort plaintiffs," and would "encourage military contractors to settle meritless product liability suits and then seek to recover the related costs through breach of contract claims." Op. Cert. at p. 18. While this argument merely begs the larger question as to who should pay for the costs that undeniably were associated with the compelled production of Agent Orange, it does serve to illustrate the important ramifications of how that question ultimately is answered. In point of fact, the Court of Appeals' interpretation of the *Spearin* doctrine results in a radical restructuring of the relationship between the government and its contractors which warrants the attention of this Court.

Orange settlement was unreasonable, this only exposes the fundamental error in the decision below. In particular, the Agent Orange settlement *already* has been declared reasonable and that finding is not subject to attack in petitioners' suit for breach of warranty. Judge Weinstein issued a 159-page opinion assessing the reasonableness of the settlement. *In Re "Agent Orange" Product Liability Litigation*, 597 F. Supp. 740 (E.D.N.Y. 1984). He concluded as follows:

> *From the defendants' point of view the settlement is reasonable*: First, defending the case would have cost more tens of millions of dollars in legal fees and expenses plus the time of employees and executives who could be doing more productive work. Second, though slight, there was a possibility of an ultimate liability with claims totalling billions of dollars. Third, an ongoing emotional trial would have created adverse publicity (whether or not unfair), perhaps causing a spillover effect against defendants' other products. Fourth, continued litigation and the possibility of an adverse result has a negative influence on the financial community, causing greater financing expenses as the companies become less attractive to investors.

Id. at 857.

The Agent Orange settlement was also approved as reasonable at the appellate level in *In Re "Agent Orange" Product Liability Litigation*, 818 F.2d 145 (2d Cir. 1987):

> [G]iven the serious nature of many of the various ailments and birth defects plaintiffs' attributed to Agent Orange, the understandable sympathy a jury would have for the particular plaintiffs, and the large number of claimants, 240,000 . . . [the manufacturers of Agent Orange] were exposed potentially to billions of dollars in damages if liability was established and millions in attorneys' fees merely to continue the litigation . . . tort law accords juries wide

> discretion, and the existence of any substantial number of serious plaintiffs would create a dangerous exposure for the chemical companies.

Id. at 151.

Finally, the government contends that the elements of the government contractor defense and the *Spearin* claim are co-extensive, and argues that if petitioners are able to meet their burden under *Spearin* here, then they could have met the terms of the defense in the underlying tort case. The government's fascile logic disguises what is in reality yet another attempt to challenge the reasonableness of the underlying settlement in the Agent Orange litigation. Moreover, while the government argues that the government contract defense and the *Spearin* claim are "carefully calibrated" to protect innocent suppliers (Op. Cert. at 19 n.10), there exists no exposition by this Court of that calibration.[8] The question is how to apportion liability when an innocent contractor is injured as a result of the government's actions in compelling production of a potentially dangerous product. Given the interests at the heart of these doctrines, the answer should be an inquiry into fault. Where the fault is the United States', then liability should rest there as well.

THE DEFENSE PRODUCTION ACT CLAIM

The Defense Production Act ("DPA" or "Act"), under whose authority Hercules and Thompson were compelled to manufacture Agent Orange, contains a hold harmless provision indemnifying manufacturers from liability "for damages or penalties for any act . . . resulting directly or indirectly from compliance with a rule, regulation, or order issued pursuant to this Act . . ." DPA Section 707, 50 U.S.C. § 2157. The plain language of Section 707

---

[8] Moreover, this "careful calibration" certainly did not exist in 1984 when the Agent Orange litigation was settled; it could not and did not work in this case, leaving petitioners with liability so significant that it forced Thompson out of business.

creates a *quid pro quo* immunizing manufacturers from liability for the conduct they are compelled to perform under the Act. See Brief Amicus Curiae of the Chamber of Commerce of the United States of America, at p. 9.

The government's approach to the analysis is to repeat the court of appeals' conclusion that "Congress did not intend Section 707 of the Act to confer an immunity broader than the risk imposed by Section 101." Op. Cert. at 22. This response merely begs the question; petitioners do not seek an immunity broader than that clearly granted by the Act. What is pointedly ignored by the United States and the court of appeals is that the authority under Section 101 directed at Hercules and Thompson was the ability to compel acceptance and performance. The issue is whether damages arising from compelled performance are covered by the hold harmless provision of the Act. The government's answer is to avoid the plain language of the Act by italicizing language authorizing the United States to compel priority,[4] thus directing the Court's attention away from the language relevant to this case which authorizes the United States to compel acceptance and performance of a contract.

---

[4] The government's statutory construction is so unique it actually supports petitioners' request that *certiorari* be granted. The government represents that the second sentence of Section 707 "refers specifically to contracts assigned priority under section 101, [which] supports the court's reading of the shield provision." Op. Cert. at 22 n.12. No rule of statutory construction allows the sweeping language of the first sentence to be limited by specifics which follow. *See* dissenting opinion of Judge Plager, App. 44a-45a.

The United States also suggests that the "notwithstanding" clause in the first sentence of Section 707 creates "an even more limited construction." Op. Cert. at 22 n.12. This language reveals quite the opposite, as this clause confers immunities: "notwithstanding that any such rule, regulation or order shall thereafter be declared by judicial or other competent authority to be invalid." The scope of this hold harmless provision is so sweeping that even damages arising from orders held invalid are subject to the protections of Section 707. *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 997 (5th Cir. 1976).

The language of the DPA is extremely clear that the scope of damages sought to be protected is all-inclusive. Congress sought to protect manufacturers compelled to perform contracts in emphatic language that "[n]o person shall be held liable" for damages resulting "directly or indirectly" from such compulsion. 50 U.S.C. § 2157. Where compulsion is used to require a private manufacturer to turn production facilities to Government use, Congress clearly intended that no harm befall the company as a result. See Brief Amicus Curiae of the Chamber of Commerce of the United States of America, at p. 10. That is not the case here.[5]

The United States questions whether the indemnity provisions of the DPA could lead to an implied-in-fact agreement to indemnify.[6] Petitioner argued below the Govern-

---

[5] The clear breadth of this proscription against liability also provides support for petitioners' *Spearin* argument. Where the government contractor defense and the *Spearin* claim act in concert, an innocent manufacturer should be protected. Where they fail to act in concert, as happened in the underlying case here, the question arises as to whether the United States or the manufacturer should bear the liability. Petitioners argue above that fault should provide the answer. Congressional intent in enacting the DPA also supports the government's liability in this case.

[6] The United States also argues that even were the scope of the Act to be seen as providing indemnity to petitioners, the Anti-Deficiency Act would prohibit such a finding. The purpose of the Anti-Deficiency Act is to keep an agent or officer of the Government from binding the United States to a contractual provision which would create a liability which is open-ended or otherwise in excess of what Congress appropriated for the matter. *California-Pacific Utilities Co.*, 194 Ct. Cl. at 720. If the contract officer had written an indemnity provision under which petitioners now have brought an action, then the Anti-Deficiency Act might apply. An implied-in-fact indemnity, just as an implied-in-fact warranty, is a judicially fashioned remedy which acknowledges the context in which a contract arose. As such, it stems from the powers of the court rather than from a contract officer. The courts, therefore, have authority to enforce such an indemnity without being subject to the Anti-Deficiency Act. *See Lopez v. A.C. & S., Inc.*, 858 F.2d

ment's 1) compulsion, 2) control over both specifications and production, 3) prohibition against labeling and warning, 4) the "hold harmless" provision of the Defense Production Act, 50 U.S.C. § 2157, under which the compulsion was brought, and 5) use of a manufacturer to its detriment create a factual context which gives rise to an implied-in-fact agreement to indemnify. As noted in *Space Age Engineering, Inc. v. United States*, 4 Cl. Ct. 739, 742 (1984):

> This court cannot redress the violation of a statute or regulation which creates no enforceable rights, (*citations omitted*), but a plaintiff may rely on the violation of a statute or regulation to show its implied contract for fair consideration has been breached. *Dynalectron Corp. v. United States*, 4 Cl. Ct. 424, 428 (1984); *see also Alabama Metal Products, Inc. v. United States*, 4 Cl. Ct. 530, 534 (1984); *Electro-Methods, Inc. v. United States*, 3 Cl. Ct. 500, 508 (1983), *aff'd in part*, 728 F.2d 1471 at 1475 (Fed. Cir. 1984).

In sum, the government provides no reason why this Court should not determine the breadth of the immunity conferred under the Defense Production Act.

CONCLUSION

For the foregoing reasons, and those stated in both the petition and amicus brief filed by the U.S. Chamber of Commerce, the petition for a writ of certiorari should be granted.

712, 716 (Fed. Cir. 1988), *cert. denied sub nom, Eagle-Picher Industries v. United States, 491 U.S. 904 (1989).* Additionally, were Deficiency Act held to apply, indemnification would not be barred because of exceptions for hazardous activities and for compelled production. *See Matter of Assumption by Government of Contractor Liability to Third Persons-Reconsideration*, 62 Comp. Gen. 361 at 365.

Respectfully submitted,

GREGORY W. HOMER
RHONDA D. ORIN
ANDERSON KILL OLICK
& OSHINSKY
2000 Pennsylvania Ave., N.W.
Suite 7500
Washington, D.C. 20006
(202) 728-3100

WALTER S. ROWLAND
HERCULES INC.
Hercules Plaza
Wilmington, Delaware 19894
(302) 594-5000

JAMES S. TURNER
ALAN DUMOFF
SWANKIN & TURNER
1424 16th Street, N.W.
Suite 105
Washington, D.C. 20036
(202) 462-8800

CARTER G. PHILLIPS *
SIDLEY & AUSTIN
1722 I Street, N.W.
Suite 900
Washington, D.C. 20006
(202) 736-8000

Counsel for Petitioners

* Counsel of Record

Dated: March 15, 1995